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Public Prosecutor v Jagadish Siddalingappa Arjunagi

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(LB)-174–05 OF 2016
AHMADI ASNAWI, ZALEHA YUSOF AND KAMARDIN HASHIM JJCA
21 FEBRUARY 2017

C

Criminal Procedure — Appeal against acquittal and discharge — Dangerous drugs found inside glass frames in box carried by respondent at airport — Whether reasonable doubt cast upon prosecution's case — Whether respondent's dociled conduct inferred absence of knowledge of drugs — Whether defence of innocent carrier applicable — Whether respondent guilty of willful blindness — Contradiction with cautioned statement — Whether trafficking proven beyond reasonable doubt — Dangerous Drugs Act s 39B(1)(a)

D

The respondent, an Indian national, was charged under s 39B(1)(a) of the Dangerous Drugs Act, 1952 ('the Act') with an offence of trafficking in dangerous drugs, ie 9,663.2 grams of ketamine. The respondent had arrived at the Low Cost Carrier Terminal (LCCT) Sepang on a flight from Bangalore, India. The respondent had with him a sling bag and two big boxes. Upon scanning the boxes, the customs officer ('PW5') noticed suspicious images in both the boxes. Further examination revealed glass frames wrapped with transparent plastics containing the dangerous drugs. The learned trial judge held that the respondent had the two boxes in his custody and control and found that the respondent had possession of the impugned drugs. The trial judge invoked the statutory presumption under s 37(d) of the Act for the element of knowledge. As for the element of trafficking, the trial judge relied on the respondent's overt act of carrying and concealing the drugs in the two boxes and transporting them from India into Malaysia, and considering the huge amount of the drugs which could not have been for his own personal consumption, the trial judge found that the respondent was trafficking in the dangerous drugs under s 2 of the Act. Hence a prima facie case was found against the respondent and the respondent was called upon to enter his defence. The respondent's defence was that he had previously visited Malaysia and had befriended a person called Venkatesh who had promised to get the respondent a job in Malaysia. According to the respondent, about two years later Venkatesh contacted him by phone and informed him that he had some glass items in Chennai and had requested him to bring the goods into Malaysia. The respondent claimed that Venkatesh's friend by the name of Selva had met the respondent at the airport at Bangalore and had given the respondent the plane ticket, the two sealed boxes, RM1,000, one sim card for use in Malaysia and Indian Rupees 4,800 for extra baggage. Selva had instructed the

respondent to hand over the boxes to Venkatesh in Malaysia. The respondent denied any knowledge that the two boxes contained drugs. He was shocked when detained by the customs and had given full cooperation to the customs officers. The respondent produced his cautioned statement which was recorded two days after his arrest. The judge found that the respondent had succeeded in raising a reasonable doubt on the prosecution's case. The learned trial judge held that the evidence of the respondent's conduct showed that he had no knowledge of the contents of the two boxes and that the respondent was an innocent carrier. The trial judge further held that the respondent's defence was consistent with his cautioned statement, and that the existence of Selva and Venkatesh was never challenged by the prosecution. The respondent was thus acquitted and discharged of the charge proffered. Hence the present appeal by the prosecution.

Held, allowing the appeal, setting aside the acquittal and discharge and convicting respondent of trafficking and sentencing him to death by hanging:

(1) The respondent's dociled conduct throughout the period he was detained till the recovery of the impugned drugs did not necessarily infer an absence of knowledge of the drugs. The contemporaneous conduct of the respondent must be examined in the light of the situation at the material time. The trial judge erred in his finding that the respondent was an innocent carrier without knowledge of the impugned drugs. Further, he had failed to examine the respondent's dociled conduct in the light of the situation prevailing at the material time (see paras 26–27 & 29).

(2) Whether the respondent was an innocent carrier without knowledge or otherwise was a question of fact. Based on the totality of the evidence, the respondent was not an innocent carrier. The respondent's story was highly improbable. The respondent was not a dim-witted naive person. He was an educated person holding a degree in BSc in Computer Science. He had all the experience working in a company dealing with courier services. There was also contradictions in the respondent's oral evidence with his cautioned statement which worked against him. The respondent had more than sufficient time to check the two boxes. But he chose not to. His failure to do so made him guilty of willful blindness (see paras 31 & 33–34).

(3) The respondent did not at any time mention the name of the two persons, Venkatesh and Selva to SP5 at the time he was detained or thereabout. The two names only came out in the cautioned statement which was recorded two days after. The trial judge should have scrutinised the evidence as to what the respondent said contemporaneously with the act or omission and also the surrounding circumstances under which the respondent acted or failed to act in considering whether the respondent had sufficiently rebutted the

presumption of possession of the impugned drugs. The trial judge's failure to do so amounted to a misdirection, necessitating appellate intervention (see para 36).

(4) Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, the trafficking charge had been proven beyond reasonable doubt against the respondent (see para 38).

[Bahasa Malaysia summary

Responden, seorang warganegara India, telah dituduh di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta') dengan satu kesalahan pengedaran dadah berbahaya, iaitu 9,663.2g ketamine. Responden tiba di Terminal Penerbangan Tambang Murah (LCCT) Sepang dengan penerbangan dari Bangalore, India. Responden mempunyai bag selimpang bersamanya dan dua kotak besar. Apabila kotak itu diimbas, pegawai kastam ('PW5') mendapati imej mencurigakan dalam kedua-dua kotak. Pemeriksaan lanjut mendedahkan bingkai kaca dibalut dengan plastik lutsinar mengandungi dadah berbahaya. Hakim bijaksana (hakim) memutuskan bahawa responden mempunyai dua kotak itu dalam jagaan dan kawalannya dan mendapati bahawa responden mempunyai milikan terhadap dadah yang dipersoalkan. Hakim menggunakan anggapan statutori di bawah s 37(d) Akta bagi elemen pengetahuan. Untuk elemen pengedaran, hakim bergantung kepada pada tindak balas responden yang membawa dan menyembunyikan dadah di dalam kedua-dua kotak dan membawanya dari India ke Malaysia, dan mengambil kira amaun besar dadah yang tidak mungkin untuk kegunaannya sendiri, hakim mendapati bahawa responden adalah mengedar dadah berbahaya di bawah s 2 Akta. Maka satu kes prima facie didapati terhadap responden dan responden telah dipanggil untuk memasukkan pembelaannya. Pembelaan responden adalah dia dahulu telah melawat Malaysia dan berkawan dengan seorang yang dipanggil Venkatesh yang berjanji akan mendapatkan responden pekerjaan di Malaysia. Menurut responden, dua tahun kemudian Ventakesh menghubunginya melalui telefon dan memaklumkan responden bahawa dia mempunyai item kaca di Chennai dan telah meminta responden untuk membawa barangan itu ke Malaysia. Responden mendakwa bahawa rakan Ventakesh yang bernama Selva telah berjumpa responden di lapangan terbang di Bangalore dan telah memberikan responden tiket penerbangan, dua kotak direkatkan, RM1,000, satu kad sim untuk kegunaan di Malaysia dan matawang India Rupee 4,800 untuk bagasi tambahan. Selva telah mengarahkan responden untuk menyerahkan kotak kepada Ventakesh di Malaysia. Responden menafikan apa-apa pengetahuan yang dua kotak itu mengandungi dadah. Dia terkejut apabila ditahan oleh kastam dan telah memberikan kerjasama penuh kepada pegawai kastam. Responden mengemukakan dalam kenyataan berhati-hatinya yang mana direkodkan dua hari selepas penangkapannya. Hakim mendapati bahawa responden telah berjaya menimbulkan keraguan munasabah terhadap kes

pendakwaan. Hakim perbicaraan bijaksana memutuskan bahawa keterangan terhadap kelakuan responden menunjukkan bahawa dia tidak mempunyai pengetahuan terhadap kandungan dua kotak dan bahawa responden adalah pembawa tidak bersalah. Hakim seterusnya memutuskan bahawa pembelaan responden adalah konsisten dengan kenyataan berhati-hatinya, dan bahawa kewujudan Selva dan Ventakesh tidak pernah dicabar oleh pendakwaan. Maka responden oleh itu telah dibebaskan dan dilepaskan terhadap tuduhan yang dibawa. Maka rayuan ini oleh pendakwaan.

Diputuskan, membenarkan rayuan, mengetepikan pembebasan dan perlepasan responden disabitkan terhadap tuduhan pengedaran dan dihukum gantung sampai mati:

(1) Kelakuan patuh responden sepanjang tempoh dia ditahan hingga dadah dipersoalkan dijumpai tidak semestinya menunjukkan ketiadaan pengetahuan terhadap dadah. Kelakuan responden pada waktu itu hendaklah diperiksa berdasarkan keadaan pada masa material. Hakim terkhilaf dalam dapatannya bahawa responden adalah pembawa tidak bersalah tanpa pengetahuan dadah yang dipersoalkan. Hakim gagal untuk memeriksa kelakuan patuh responden berdasarkan keadaan yang berlaku pada waktu material (lihat perenggan 26–27 & 29).

(2) Sama ada responden adalah pembawa tidak bersalah tanpa pengetahuan atau sebaliknya adalah satu soalan fakta. Berdasarkan keseluruhan keterangan, responden bukanlah pembawa tidak bersalah. Cerita responden adalah amat tidak mungkin. Responden bukanlah orang yang dungu tidak berpelajaran. Dia adalah orang yang terpelajar memegang ijazah dalam BSc Sains Komputer. Dia mempunyai semua pengalaman bekerja di syarikat yang menguruskan perkhidmatan kurier. Terdapat juga percanggahan dalam keterangan lisan responden dengan kenyataan berhati-hatinya yang mana menentangnya. Responden mempunyai masa yang lebih dari mencukupi untuk memeriksa dua kotak itu. Tetapi dia tidak berbuat demikian. Kegagalannya untuk melakukan perkara itu membuatkan dia bersalah kerana buta dengan sengaja (lihat perenggan 31 & 33–34).

(3) Responden tidak pada bila-bila masa menyatakan nama dua orang, Venkatesh dan Selva kepada SP5 sewaktu dia ditahan atau di sana. Dua nama itu hanya dinyatakan dalam kenyataan berhati-hati yang mana dilaporkan dua hari kemudian. Hakim sepatutnya meneliti keterangan seperti yang dikatakan oleh responden pada waktu itu bersama tidakan atau peninggalan dan juga keadaan sekitar yang mana responden bertindak atau gagal bertindak dalam mempertimbangkan sama ada responden telah dengan cukup mematahkan anggapan pengedaran dadah yang dipersoalkan. Kegagalan hakim berbuat demikian dikira

A sebagai salah arah, memerlukan kepada campur tangan rayuan (lihat perenggan 36).

(4) Mengambil kira keseluruhan keterangan, keadaan sekitar dan kemungkinan kes, pertuduhan pengedaran telah dibuktikan melampaui keraguan munasabah terhadap responden (lihat perenggan 38).]

B

Notes

For cases on s 39B(1)(a), see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 451–659.

C **Cases referred to**

Baharudeen Mohamed Yusoff Ghaney v PP [2013] 2 MLJ 425; [2012] 1 LNS 263, CA (refd)

PP v Badrulsham bin Baharom [1988] 2 MLJ 585 (refd)

Teh Hock Leong v PP [2010] 1 MLJ 741, FC (refd)

D *Zulfikar bin Mustaffah v PP* [2001] 1 SLR 633, CA (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 37(d), First Schedule

E **Appeal from**: Criminal Trial No 45A-214–09 of 2012 (High Court, Shah Alam)

Tengku Amir Zaki bin Tengku Abdul Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.

F *N Subramaniyan (Subramaniyan) for the respondent.*

Kamardin Hashim JCA (delivering judgment of the court):

INTRODUCTION

G

[1] The respondent, an Indian national, was charged before the High Court at Shah Alam with trafficking in dangerous drugs. The charge read as follows:

> Bahawa kamu pada 5 April 2012, lebih kurang jam 7.45 pagi di Pejabat Cawangan Pemeriksaan Penumpang 2, Balai Ketibaan Antarabangsa, Terminal Pengangkutan Tambang Murah (LCCT), di dalam daerah Sepang, di dalam negeri Selangor Darul Ehsan telah didapati mengedar dadah berbahaya iaitu 9,663.2 gram Ketamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

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[2] At the end of the prosecution's case, the learned High Court judge ('the learned trial judge') was satisfied that the prosecution had established a prima facie case against the respondent on the proffered charge. Accordingly the respondent was called upon to enter on his defence.

[3] Upon hearing the defence, the learned trial judge acquitted and discharged the respondent after holding that the respondent was an innocent carrier without the prerequisite knowledge of the impugned drugs.

[4] Aggrieved, the public prosecutor appealed to this court against the acquittal of the respondent. After hearing the parties, we allowed the appeal. We now give our grounds in doing so.

THE PROSECUTION'S CASE

[5] Briefly, the prosecution's case may be summarised as follows. On 5 April 2012 at about 2.30am, the respondent arrived at the Low Cost Carrier Terminal (LCCT) Sepang on a flight from Bangalore, India. The respondent had with him a sling bag and two big boxes. Upon instructions from a Customs Officer, Farah Dillah, the two boxes were scanned.

[6] Customs Officer, Lumis ak Peter ('PW5'), the officer who was manning the scanning machine noticed suspicious images in both the boxes. PW5 immediately informed his superior, Customs Superintendant, Nor Azlizan. PW5 was instructed to open one of the two boxes. When the box was opened, PW5 discovered there were six smaller boxes inside the big box. When the smaller boxes were scanned, the same suspicious images appeared.

[7] PW5 then opened one of the smaller boxes and discovered inside there was a glass frame wrapped with transparent plastics. When the glass frame was scanned, the same suspicious images appeared. There upon the respondent was detained and taken together with all the exhibits to the passengers checking room ('CPP2') for a more detailed examination.

[8] At the CPP2 room, Superintendent of Customs, Muhammad Ardy bin Ismail ('PW6') instructed the respondent to open the two boxes which the respondent did. PW5 discovered that inside each of the two boxes were six smaller boxes. When opened, all the twelve smaller boxes were found each to contained a glass frame. Inside each of the twelve glass frames, there was one plastic packet containing some crystalline substances suspected to be dangerous drugs marked by PW6 as A1(1)(1)(1)(1), A1(2)(1)(1)(1), A1(3)(1)(1), A1(4)(1)(1)(1), A1(5)(1)(1)(1), A1(6)(1)(1), A2(1)(1)(1)(1) to A2(6)(1)(1)(1) respectively.

[9] All the exhibits suspected to be dangerous drugs were later sent by SP6 to the Chemistry Department. The chemist, Suhana bt Ismail ('PW4') confirmed that she received all the exhibits for analysis. PW4 also confirmed, upon analysis that the exhibits contained 9,663.2g of ketamine. Ketamine is listed in the First Schedule of the Dangerous Drugs Act 1952 ('the Act').

Findings of the trial judge at the end of the prosecution's case

[10] The learned trial judge considered and accepted the evidence of PW4 on the drugs analysis undertaken by the witness. The learned trial judge concluded that there was no defect in PW4's analysis and there was no challenge by the defence on the identity of the impugned drugs. The learned trial judge accepted the evidence of PW4 on the type and weight of the drugs, the subject matter of the charge.

[11] As for the element of possession, based on the factual matrix of the case that at the time the respondent was detained, the respondent was carrying the two boxes in which the glass frames bearing the impugned drugs were recovered. The two boxes carried with them baggage tags in the respondent's name. The learned trial judge held that the respondent was having in his custody and control of the two boxes containing the impugned drugs. The learned trial judge found that the respondent had possession of the impugned drugs and invoked the statutory presumption under s 37(d) of the Act for the element of knowledge.

[12] As for the element of trafficking, the learned trial judge relied on the evidence that the respondent's overt act of carrying and concealing the drugs in the two boxes and transporting them from Bangalore, India, into Malaysia as evinced from the respondent's passport ('P10'), *rekod keluar masuk* ('P16') and the flight manifest ('P17'), and considering the huge amount of the drugs which could not have been for his own personal consumption, the learned trial judge found that the respondent was trafficking in the dangerous drugs under s 2 of the Act.

[13] After being satisfied that all the elements of the charge had been established, the learned trial judge held that the prosecution had proven a prima facie case against the respondent on the charge proffered. Thus, the respondent was called upon to enter his defence.

THE DEFENCE

[14] The respondent elected to give evidence under oath. The respondent was the sole witness for the defence. In his evidence, the respondent stated that he was from India. He worked in a company known as Flipcard. Com as an document logistic executive. The company provided online services. The respondent had an academic degree, BSc in Computer Science. He worked in Flipcard. Com for one year. Prior to that he worked in Cube Solutions which was a call centre.

[15] The respondent had been to Malaysia sometimes in June or July 2010

with two of his friends as a tourist. While he was in Malaysia, he had met a person named Venkatesh in Jln Masjid India, Kuala Lumpur. The respondent had asked Venkatesh whether he could get a job in Malaysia and Venkatesh told him that if there were any vacancy, he would inform the respondent by phone. The respondent gave Venkatesh his contact number but nothing happened for two years.

[16] According to the respondent, sometimes in 2012, Venkatesh contacted him by phone and informed him that he had some of his goods in Chennai and had requested him to bring the goods into Malaysia. Venkatesh informed him that the goods were glass items without giving any further explanation about the nature of the same.

[17] The respondent in his further evidence said that he was given money and plane tickets to bring the glass items to Malaysia. Venkatesh promised him that upon arriving at the airport in Malaysia, Vankatesh's friend would pay him another RM1,000. This offer was made to him in April 2012. Later a person by the name of Selva had contacted him by phone.

[18] On 4 April 2012 at about 2–2.30pm, the respondent left his house to go to the airport at Bangalore. At the airport he met Selva and was given the plane ticket, the two sealed boxes, RM1,000, one sim card for use in Malaysia and Indian Rupees 4,800 for extra baggage. Selva instructed him to hand over the boxes to Venkatesh in Malaysia. After receiving the two boxes, he then checked in his baggage and boarded the flight to Malaysia. The flight was at 7pm.

[19] After arriving at KLIA, he retrieved the two boxes and took his baggage to the scanning machine. When asked by the officer manning the scanning machine, he told the officer that the two boxes contained glass items. The respondent gave his full cooperation during the whole process when the two boxes were scanned and checked by the customs officers. The respondent deny any knowledge that the two boxes contained drugs. He expressed shock and sat down slowly when told about the discovery of ketamine in the two boxes. The respondent produced his cautioned statement, D85, recorded on the 6 April 2012, two days after his arrest (at pp 166–171 AR Vol 3B).

[20] The learned trial judge after considering the respondent's version, found that the respondent had succeeded in raising a reasonable doubt on the prosecution's case. The learned trial judge held that the respondent's evidence as to his conduct showed that he had no knowledge of the contents of the two boxes and that the respondent was an innocent carrier.

[21] The learned trial judge further held that the defence of the respondent

was consistent with his cautioned statement, D85, and that the existence of Selva and Venkatesh was never challenged by the prosecution.

[22] The respondent was thus acquitted and discharged of the charge proffered. Hence the appeal before us.

THE APPEAL

[23] Before us the learned deputy public prosecutor ('the learned deputy') canvassed only one solitary ground of appeal, namely, that the defence of an innocent carrier does not applicable to the respondent. The learned deputy argued that the learned trial judge had made a wrong finding when His Lordship held that the defence of innocent carrier was applicable to the respondent as there was no overt act on the part of the respondent.

OUR DECISION

[24] The crux of the learned deputy's complaint was mainly centred on the learned trial judge's findings of fact and on the evaluation of the respondent's evidence. The trial judge took the view that the *mere act* of carrying the two boxes was not sufficient to constitute the offence of trafficking. To constitute an offence of trafficking under the Act, the learned trial judge opined that there must be *mens rea* possession accompanied by some overt act to show knowledge on the part of the respondent of the drugs exhibits in the two boxes.

[25] The learned trial judge had evaluated the respondent's defence at great length. For ease of reference we reproduce the following passages in the grounds of judgment of the trial judge at pp 31–34 of the AR Vol 1:

> 40. Secara spesifiknya, pembelaan OKT bolehlah dirumuskan seperti berikut:
>
> (1) OKT menafikan mempunyai pengetahuan tentang dadah yang disorok di dalam 12 bingkai cermin yang terdapat dalam kotak-kotak P23 dan P40; dan
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> (2) Kotak-kotak tersebut telah diberi oleh Selva untuk dibawa ke Malaysia dan kemudiannya akan diserahkan kepada Venkatash. OKT hanyalah pembawa yang tidak bersalah (innocent carrier).
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> 41. Untuk menentukan sama ada keterangan OKT telah berjaya menimbulkan keraguan munasabah ke atas kes pendakwaan dan juga berjaya mematahkan anggapan di atas beban kebarangkalian, maka Mahkamah perlu memeriksa keterangan saksi-saksi pendakwaan dan pembelaan secara keseluruhan.
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> 42. Mahkamah telah meneliti 'conduct' OKT semasa mula diminta mengimbas dua kotak P23 dan P40 di mesin pengimbas. Pada semua masa material OKT tidak nampak gelisah atau menunjukkan apa jua perasaan takut. Sebaliknya OKT telah bersetuju dan secara sukarela membuka kedua-dua kota besar tersebut. Malah

apabila ditanya oleh SP5 apa yang ada dalam kotak-kotak itu, OKT memberitahu dengan yakin bahawa isi kandungannya ialah 'glass items'. Tingkah laku OKT ini dengan jelasnya menunjukkan OKT tidak tahu apa yang ada dalam kedua-dua kotak besar tersebut.

43. Selepas kotak-kotak besar P23 dan P40 dibuka dan didapati di dalamnya terdapat kotak-kotak kecil yang berisi bingkai cermin yang ditape dan diseal seperti di gambar P6 (53-54), OKT diminta membuka tape dan OKT bersetuju. Apabila tape dibuka didapati terdapat satu 'cover' di belakangnya yang kemudian ditemui satu plastik pembalut dan dalam pembalut ditemui dadah sepertimana Eks P6(55-58). Sebanyak 12 peket plastik berisi dadah berbahaya jenis Ketamin ditemui dalam 12 bingkai cermin tersebut sepertimana ditunjukkan dalam gambar P6 (181-182). SP5 telah menunjukkan bingkai-bingkai cermin beserta serbuk kristal putih dalam plastik disyakki dadah kepada OKT. Menurut SP5, hanya pada masa itu OKT nampak gelisah. SP5 tanya OKT, apa ini? OKT kata dia tak tahu. Dia kata 'My friend gave this box to me in India'. OKT telah memberitahu SP5 bahawa kotak-kotak itu telah diberi oleh Selva di Bangalore. Tingkah laku OKT juga disaksikan oleh SP6. Menurut SP6, sebelum melihat barang, OKT macam biasa sahaja. Berdasarkan testimoni saksi-saksi SP5 dan SP6, Mahkamah membuat suatu inferens bahawa OKT hanya mempunyai milikan pasif ke atas kedua-dua kotak P23 dan P40 (rujuk kes *Public Prosecutor v Salleh bin Zakaria & Anor* [2010] 4 MLJ 25; [2010] 4 CLJ 671, *Public Prosecutor v Rozali Johari* [2009] 2 CLJ 133).

44. OKT telah mengemukakan rakaman percakapan beramarannya diperingkat kes pendakwaan iaitu Eksibit D85. Rakaman percakapan ini dibuat beberapa jam selepas OKT ditangkap iaitu OKT ditahan pada 5 April 2012 jam lebih kurang 2.30 pagi dan rakaman percakapan dibuat pada 6 April 2012 lebih kurang jam 11.00 pagi dalam D85, telah menyebut nama Selva dan Vankatesh yang mana konsisten dengan keterangan pembelaannya.

45 Mahkamah telah memberi pertimbangan ke atas D85 yang tidak dicabar oleh pihak pendakwaan khususnya mengenai kewujudan watak Selva dan Vankatesh. Dari segi undang-undang kegagalan mencabar keterangan yang memihak kepada OKT boleh dianggap sebagai pengakuan bahawa keterangan itu tidak dipertikaikan (rujuk *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; [1981] 1 LNS 138, *Chukwudi Hassan lwn Pendakwa Raya* [2015] MLJU 847; [2015] 8 CLJ 353).

Kesimpulan

46. Mahkamah dapati apa yang jelas daripada keseluruhan keterangan saksi-saksi pendakwaan hanyalah OKT membawa 2 kotak besar yang telah dibalut rapi dengan tape. Tiada apa-apa keterangan atau bukti yang menunjukkan bahawa OKT tahu adanya dadah yang dibalut dengan plastik lutsinar disembunyikan di dalam bingkai-bingkai cermin muka tersebut. Juga tiada apa jua bukti mengenai mens rea possession yang telah dibuktikan oleh pihak pendakwaan. Mahkamah berpendapat tingkah laku OKT semasa kedua-dua kotak besar dibuka dan kotak-kotak kecil dibuka telah menunjukkan OKT tidak mempunyai pengetahuan mengenai dadah dalam bingkai-bingkai cermin tersebut. Mahkamah juga mendapati keterangan pembelaan OKT konsisten dengan Pernyataan Amaran D85 yang dikemukakannya. Mengambilkira keseluruhan keterangan ini, Mahkamah memutuskan bahawa pembelaan OKT telah berjaya menimbulkan satu keraguan

A yang munasabah ke atas ke pendakwaan dan sekaligus telah mematahkan anggapan pengetahuan di atas imbangan kebarangkalian. Oleh itu OKT dilepas dan dibebaskan dari pertuduhan.

B **[26]** From the above, we observed that in holding that the respondent had successfully rebutted the presumption of knowledge under s 37(d) of the Act earlier the learned trial judge invoked during the prosecution's case on the balance of probabilities and in holding that the respondent had casted a reasonable doubt on the prosecution's case, the learned trial judge had relied on the dociled conduct of the respondent and the fact that the respondent's C testimony in court were consistent with his cautioned statement ('D85').

[27] In respect of the dociled conduct of the respondent, we agreed with the learned deputy's submission that the respondent's dociled conduct throughout D the period he was detained till the recovery of the impugned drugs did not necessarily infer an absence of knowledge of the drugs. The contemporaneous conduct of the respondent must be examined in the light of the situation at the material time as propagated by the apex court in *Teh Hock Leong v Public Prosecutor* [2010] 1 MLJ 741.

E

[28] In *Teh Hock Leong*, the facts was that the appellant was confronted by the police at the arrival gate which is a tight and restricted area with hardly any room for the appellant to make a successful escape. The appellant's chances of a quick getaway were minimal since he was escorted and was within the F restricted vicinity of the KLIA building. Any attempt by the appellant to throw away or disassociated himself with the backpack which contained the impugned drugs would have been evidently noticeable. Further, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. It was held:

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> [5] It is our view that in order to draw a favourable inference from the appellant's contemporaneous conduct, his action or inaction must be examined in the light of the situation at the material time. The area where the appellant was confronted by PW5 was the arrival gate of an incoming flight in the KLIA. This was the only exit point where passengers disembarking the plane can enter the KLIA terminal. It is H common knowledge that the area was tight and restricted with hardly any room for the appellant to make a successful escape even if he had tried. From here the appellant was then taken by PW5 and his men to PW5's office in the KLIA. The approximate walking distance was 600–800 metres. Here again the appellant's chances of a quick getaway were minimal since he was escorted and was within the I restricted vicinity of the KLIA building. And, if the appellant were to attempt to throw away or disassociate himself with the backpack during this entire duration described it would evidently be noticeable. Of course, since the drugs were so cunningly concealed, there could be no necessity to take such drastic actions which may attract instant suspicion. So against these circumstances, the appellant's docile conduct throughout the period described could not have inferred an absence of

knowledge of the said drugs. For this reason there is no misdirection by the courts below. A

[29] We agreed with the learned deputy's contention that the learned trial judge erred in his finding that the respondent was an innocent carrier without knowledge of the impugned drugs. We found that the learned trial judge had failed to examine the respondent's dociled conducts in the light of the situation prevailing at the material time. His Lordship in his grounds commented that 'Menurut SP5, hanya pada masa itu OKT nampak gelisah. SP5 tanya OKT, apa ini? OKT kata dia tak tahu. Dia kata 'My friend gave this box to me in India'. OKT telah memberitahu SP5 bahawa kotak-kotak itu telah diberi oleh Selva di Bangalore' (p 33 AR Vol 1). We found that the evidence of SP5 during his cross-examination showing otherwise. At pp 29–30 AR Vol 2, SP5 said: B C

S: Kamu tanya dia dalam Bahasa Malaysia atau Bahasa Inggeris? D

J: Bahasa Inggeris, dia cakap I don't know.

S: Dia kata my friend gives this box to me?

J: Tak setuju.

... E

S: OKT telah beritahu kamu kawannya Selva meminta dia bawa barang ini ke Malaysia?

J: Tidak setuju.

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[30] Another point raised by the learned deputy was that the finding of the trial judge that the respondent's cautioned statement ('D85') was consistent with the respondent's testimony in court and that it was never challenged by the prosecution. We found this was not true as the existence of Selva and Venkatesh was disputed by the prosecution (at p 56 AR Vol 2). G

S: Saya katakan Selva dan Venkatesh tidak wujud?

A: Tidak setuju.

[31] As stated earlier, the respondent's defence was that he was an innocent carrier and he had no knowledge of the impugned drugs that were found in the two boxes he was carrying. Whether the respondent was an innocent carrier without knowledge or otherwise is a question of facts. Having considered the totality of the evidence before us, with respect, we disagreed with the finding of the learned trial judge that the respondent was an innocent carrier. We found that the respondent's story to be highly improbable. The respondent had met Venkatesh only once in Malaysia in 2010. Suddenly, in January 2012 the respondent received a call from Venkatesh asking him to bring glass items from India to Malaysia. The respondent did not know what was Venkatesh doing in H I

Malaysia, they never met after 2010 and Venkatesh was a total stranger to the respondent. How could then Venkatesh so easily paid the air tickets and gave the respondent cash to bring the glass frame from India to Malaysia which is more costly compared to sending the items by courier. Afterall, the respondent was at that time working with a company involved in courier services.

[32] The respondent's testimony in court was that he never knew and never met Selva before this. Selva was only introduced to him by Venkatesh. The respondent did not know the address and the telephone number of Selva, but had met twice. How could the respondent easily believed what was told by Selva to him about the two boxes and willingly, with full enthusiasm send the two boxes personally to Malaysia.

[33] We found that the respondent was not a dim-witted naive person. He was such an educated person holding a degree in BSc in Computer Science. He had all the experience working in a company dealing with courier services. Surely he ought to have been aroused and suspicious about the very true purpose of the transaction. In *Baharudeen Mohamed Yusoff Ghaney v Public Prosecutor* [2013] 2 MLJ 425; [2012] 1 LNS 263 KN Segara JCA had said this:

> [18] We find no reason to disagree with the trial judge's findings in his judgment as follows:
>
> > Hence having regard to his educational background, it is hard to believe that the accused did not know at all about the drugs inside the 31 tins that he was carrying in the grayish green bag (P7). As an educated man, why was the need for him to carry 31 tins of 'sweets' all the way from India to Malaysia for somebody called Farouk back home. Besides, Farouk could have done it himself. Why did not Farouk carry it out himself? If really sweets, Farouk himself could have sent them by courier which could be very much cheaper than using the service of the accused which the former had to pay for all his expenses in flying to Malaysia. The flight fares alone would have cost Farouk a substantial sum of money. The accused himself, a mathematician ought to be aware of this fact.
> >
> > Therefore the suspicion of the accused as a highly educated, reasonable and sane man ought to have been aroused about the very true purpose of the transaction. In the true sense of the word he was not a country bumpkin from a village in Chennai, India and prior to this trip, he had in fact even been to Malaysia before.
> >
> > The only reasonable conclusion for the court to draw is that in reality, the accused knew what he was doing and was fully aware of the presence of the drugs in all the 31 tins. Besides, the prosecution had adduced evidence that P7 belonged to the accused because the baggage tag bore the name of the accused attached to the handle of the bag in question.
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> [19] Again we are in complete agreement with the trial judge that the conduct of the accused displayed nothing short of willful blindness towards the contents of the 31 tins inside P7. He also correctly relied on the Singapore Court of Appeal case

Zulfikar bin Mustaffah v Public Prosecutor [2001] 1 SLR 633, although there are our own reported cases on the same issue. It was held in that case:

> It is thus not enough for an accused merely to assert absence of knowledge. The facts of the case must be examined as a whole to see whether he had good reason to suspect that he was carrying drugs ... In short, ignorance is a defence only when there is no reason for suspicion and no right and opportunity of examination; ignorance *simpliciter* is not enough.

[34] There was also contradictions in the respondent's oral evidence with his cautioned statement which worked against him. We found material contradictions in the respondent's evidence. At p 52 AR Vol 2, the respondent said in his examination-in-chief:

> ... Bila Selva bawa kotak-kotak ini saya ada tanya dia dalamnya ada apa.
>
> Dia jawab barang dalam kotak gelas item. Saya telah tanya kepadanya bolehkah check kandungan dalam kotak. Selva kata kotak itu telah sedia packing kalau buka kena packing balik ...

At p 57, during re-examination, the respondent said:

> Saya jawab tidak cuba melihat kandungannya. Saya tidak buka kotak itu sebab selepas kotak itu diberi saya terus checkin dan masuk ke boarding. Saya juga tidak punyai apa-apa alat untuk buka tape tersebut.

Whereas, in his cautioned statement ('D85'), he said that he met Selva by the roadside outside the airport where the two boxes were handed over to him together with RM1,000, Indian Rupee 4800, his passport and the air tickets. That was at 4.30pm. The respondent also stated that his flight was at 7pm (p 170 AR Vol 3B). If it is true, then the respondent had more than sufficient time to check the two boxes. But he chose not to. He willfully shut his eyes. His failure to do so made him guilty of willful blindness.

[35] On the issue of willful blindness, we are in no better position than to adopt in extensso the view of Raus Sharif PCA in the most recent decision of the Federal Court in *Public Prosector v Herlina Purnama Sari* Criminal Appeal No 05–179–08 of 2015(B) (unreported) where His Lordship said:

> 42. In our judgment, that the manner in which the impugned drugs were concealed in the two boxes which were found in the respondent's luggage goes to show that the respondent knew the contents of the two boxes. It is not enough for the respondent to merely assert absence of knowledge. On the facts, there are many reasons for the respondent to be suspicious that the luggage she was carrying contained impugned drugs. But she willfully shut her eyes. It is preposterous to accept the respondent's defence that she had agreed to carry something in her luggage to help Jo, a total stranger, to have the two boxes delivered to Jo's friend in Laos.

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43. In our assessment, looking at the evidence in totality, the respondent could not exculpate herself from her involvement in the trafficking of the seized drugs by saying that she had no knowledge or that she was an 'innocent carrier' in this transaction. In our view, she could not be 'innocent' when she voluntarily agreed to hand over the boxes to a third party that she hardly knew in another country without enquiring further as to the contents of the said boxes. The respondent, without any such inquiry, which she wound have been reasonably expected to make in any event, had agreed to give the boxes to someone just as a favour for her friend Vivian. The respondent should have refused to carry out such an assignment if no satisfactory explanation as to their contents was forthcoming from Vivian whom she was in contact with. Her failure to do so makes her guilty of willful blindness.

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44. Willful blindness necessarily entails an element of deliberate action. If the person concerned has a clear reason to be suspicious that something is amiss but then embarks on a deliberate decision not to make further inquiries in order to avoid confirming what the actual situation is, then such a decision is necessarily a deliberate one. The key threshold element in the doctrine of willful blindness itself is that of suspicion followed by (and coupled with) a deliberate decision not to make further investigations. Whether the doctrine of willful blindness should be applied to any particular case would be dependent on the relevant inferences to be drawn by the trial judge. From all the facts and circumstances of the particular case, giving due weight, where necessary, to the credibility of the witnesses (see *Public Prosecutor v Tan Kok An* [1996] 1 MLJ 89; [1995] 4 MLRH 256).

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45. The concept of 'willful blindness' had been discussed in a number of local cases but it seems to have had its genesis in the dissenting judgment of Yong Pung How CJ (Singapore) in the case of *Public Prosecutor v Hla Win* [1995] 2 SLR 424. The doctrine of 'willful blindness' can be summarised to be applicable to a situation where the circumstances are such as to raise suspicion sufficient for a reasonable person to be put on inquiry as to the legitimacy of a particular transaction. To put it another way, if the circumstances are such as to arouse suspicion, then it is incumbent on a person to make the necessary inquiries in order to satisfy himself as to the genuineness of what was informed to him. Should he fail to embark upon this course of action, then he will be guilty of 'willful blindness'. In other words he is then taken to know the true situation. He then cannot be said to have either rebutted the presumption of knowledge or have raised a reasonable doubt as to his knowledge of the situation.

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46. Most of the cases where the concept was held to apply concerned cases in which the accused was asked to carry certain articles, or a package, or a bag, or to swallow certain items. In these circumstances, where the request to do any of those things mentioned would be such as would arouse the suspicion of a reasonable person as to the contents, it was upon the accused to make sufficient inquiries so as to dispel or to set straight such suspicions. Should the accused not make any or any sufficient inquiries under those circumstances, the concept of willful blindness would apply so as to fasten upon him or her the necessary knowledge as to the nature of those contents. In other words, if he deliberately 'shuts his eyes' to the obvious, because he 'doesn't want to know', he is taken to know.

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47. In the present case, based on the evidence, it is our view that the respondent is not an innocent carrier but a trafficker. As we have alluded to earlier, in essence the

> defence of innocent carrier raised by the respondent has no merit because the respondent had every opportunity to check for herself what she was carrying. In our judgment any reasonable person similarly circumstanced would have asked what were in those boxes. The respondent here is not a hapless victim caught in the web of inevitable circumstances beyond her control. We find no ring of truth in her story.

[36] The learned deputy finally raised the issue that the respondent did not at anytime mention the name of the two persons, Venkatesh and Selva to SP5 at the time he was detained or thereabout. The two names only came out in the cautioned statement D85 which was recorded two days after. We were of the view that in view of this, it is right for the trial judge to scrutinised the evidence as to what the respondent said contemporaneously with the act or omission and also the surrounding circumstances under which the respondent acted or failed to act in considering whether the respondent had sufficiently rebutted the presumption of possession of the impugned drugs which were found in his physical custody and control. Failure of the trial judge amounted to a misdirection, necessitating an appellate intervention (*Public Prosecutor v Badrulsham bin Baharom* [1988] 2 MLJ 585).

[37] As regards the fact that the impugned drugs were securely concealed in the glass frames in the two boxes, we echoed the view of Yong Pung How CJ (Singapore) in *Zulfikar bin Mustaffah v Public Prosecutor* [2001] 1 SLR 633 as follows at p 187:

> ... In the course of the appeal before us, counsel for the appellant relied heavily on the fact that the contents of the bundles were securely wrapped in newspapers and could not be identified. We were accordingly invited to draw the inference that the appellant had no knowledge of the contents of the bundles.
>
> We were unable to accede to this request. While the fact that the contents of the bundles were hidden from view may have been relevant in determining whether the requisite knowledge was absent, this factor should still not be given too much weight. Otherwise, drug peddlers could escape liability simply by ensuring that any drugs coming into their possession are first securely sealed in opaque wrappings. Rather, the court must appraise the entire facts of the case to see if the accused's claim to ignorance is credible. As Yong Pung How CJ remarked in *Public Prosecutor v Hla Win* [1995] 2 SLR(R) 104 at para 51:
>
> > In the end, the finding of the mental state of knowledge, or the rebuttal of it, is an inference to be drawn by a trial judge from all the facts and circumstances of the particular case, giving due weight to the credibility of the witnesses.

CONCLUSION

[38] Having regard to the totality of the evidence, the surrounding circumstances and the probabilities of the case, it was our finding that the

A trafficking charge had been proven beyond reasonable doubt against the respondent.

[39] We therefore allowed the appeal. We set aside the order of acquittal and discharge and substituted it with an order that the respondent be convicted of the trafficking charge. We ordered the respondent to be sentenced to death by hanging.

Appeal allowed, acquittal and discharge set aside, respondent convicted of trafficking and sentenced to death by hanging.

Reported by Kanesh Sundram